

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

ROBERT TURNAUCKAS et al.,  
  
Plaintiffs,  
  
vs.  
  
BANK OF AMERICA et al.,  
  
Defendants.

CASE NO. 15cv1566-LAB (WVG)

**ORDER GRANTING MOTIONS TO  
DISMISS (DOCKET NOS. 6 AND 9)  
AND MOTION TO EXPUNGE *LIS  
PENDENS* (DOCKET NO. 11)**

This case arises out of the Turnauckases' unpaid home loan. The Turnauckases brought this lawsuit against Bank of America, ReconTrust, and Caliber after ReconTrust began the process of foreclosing on their home. All defendants have moved to dismiss. (Docket nos. 6 and 9.) Caliber has also moved to expunge the Turnauckases' notice of *lis pendens*. (Docket no. 11.)

**I. Background**

The Turnauckases purchased a house, took out a home loan, and executed a note and deed of trust ("DOT") in favor of the lender, Countrywide. (Docket no. 1-2 at ¶¶ 21, 23.) ReconTrust was named trustee, and Mortgage Electronic Registration Systems ("MERS") was named beneficiary and nominee of the lender. (*Id.* at ¶ 24.) The Turnauckases admit that they owe money on their loan. (*Id.* at ¶¶ 21, 23, 24.) But, they contend, the defendants lack any interest in the loan. (*Id.* at ¶¶ 26, 30.) The Turnauckases don't allege facts

1 indicating that any other entity might have interest in the loan. For example, they don't claim  
 2 that there's a dispute over who they should pay because multiple lenders seek repayment  
 3 on the same home loan. They stop short at claiming "multiple parties *may* seek to enforce  
 4 the debt obligation against [them]." (*Id.* at ¶ 31 (emphasis added).) Instead, they argue, "the  
 5 lien on [their] house has become unperfected and unenforceable." (*Id.* at ¶ 30.) According  
 6 to the Turnauckases, this happened because (1) the defendants botched the securitization  
 7 process by violating the Pooling and Servicing Agreement, (*id.* at ¶¶ 13, 25, 27, 29, 30); (2)  
 8 MERS' involvement split the Note and DOT, so subsequent assignments of the DOT were  
 9 ineffective, (*id.* at ¶¶ 30, 33–43, 73–82); and (3) the DOT assignment and substitution of  
 10 trustee were fraudulent, (*id.* at ¶¶ 44–70.)

## 11 **II. Request for Judicial Notice**

12 In ruling on a motion to dismiss, the Court may take judicial notice of matters of public  
 13 record, provided that they aren't subject to reasonable dispute. *See, e.g., Sherman v.*  
 14 *Stryker Corp.*, 2009 WL 2241664 at \*2 (C.D.Cal. 2009) (citing *Lee v. City of Los Angeles*,  
 15 250 F.3d 668, 688 (9th Cir. 2001) and Fed. R. Evid. 201). Bank of America, ReconTrust,  
 16 and Caliber seek judicial notice of documents recorded in the San Diego County Recorder's  
 17 Office. (See Docket nos. 7 and 12.) These documents are proper subjects of judicial notice.  
 18 *Moreland v. U.S. Bank, NA*, 2015 WL 1932644, at \*3 (E.D. Cal. Apr. 15, 2015) (taking judicial  
 19 notice of court records and public records filed at recorder's office). And they're not subject  
 20 to reasonable dispute. The requests to take judicial notice are **GRANTED**.

## 21 **III. Discussion**

### 22 **A. Legal Standard**

23 A 12(b)(6) motion to dismiss for failure to state a claim challenges the legal sufficiency  
 24 of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The Court must accept  
 25 all factual allegations as true and construe them in the light most favorable to the  
 26 Turnauckases. *Cedars Sinai Med. Ctr. v. Nat'l League of Postmasters of U.S.*, 497 F.3d  
 27 972, 975 (9th Cir. 2007). To defeat the motions to dismiss, the Turnauckases' factual  
 28 allegations need not be detailed, but they must be sufficient to "raise a right to relief above

1 the speculative level . . . .” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). That is,  
 2 “some threshold of plausibility must be crossed at the outset” before a case can go forward.  
 3 *Id.* at 558 (internal quotation marks omitted). A claim has “facial plausibility when the plaintiff  
 4 pleads factual content that allows the court to draw the reasonable inference that the  
 5 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).  
 6 “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than  
 7 a sheer possibility that a defendant has acted unlawfully.” *Id.*

8 While the Court must draw all reasonable inferences in the Turnauckases’ favor, it  
 9 need not “necessarily assume the truth of legal conclusions merely because they are cast  
 10 in the form of factual allegations.” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136,  
 11 1139 (9th Cir. 2003) (internal quotation marks omitted). A complaint doesn’t suffice “if it  
 12 tenders naked assertions devoid of further factual enhancement.” *Iqbal*, 556 U.S. at 664.  
 13 (internal quotation marks omitted).

14 When a claim is “grounded in fraud and its allegations fail to satisfy the heightened  
 15 pleading requirements of Rule 9(b), a district court may dismiss the . . . claim.” *Vess v.*  
 16 *Ciba—Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir. 2003). To satisfy the particularity  
 17 requirement of Rule 9(b), “[a]verments of fraud must be accompanied by ‘the who, what,  
 18 when, where, and how’ of the misconduct charged.” *Id.* at 1106 (internal quotation marks  
 19 omitted). The circumstances constituting the alleged fraud must “be specific enough to give  
 20 defendants notice of the particular misconduct . . . so that they can defend against the  
 21 charge and not just deny that they have done anything wrong.” *Id.* at 1106 (internal  
 22 quotation marks omitted).

## 23 **B. The Turnauckases’ Fail to Adequately Allege a Cognizable Claim**

### 24 **1. The Turnauckases Lack Standing to Challenge the Securitization**

25 The Turnauckases’ central argument is that, because certain transactions in the  
 26 securitization process violated the governing trust documents, the securitization failed. (See,  
 27 e.g., Docket no. 1-2 at ¶¶ 13–20, 25–32.) Thus, they argue, the defendants have no interest  
 28 in, or ability to assign, the DOT. (*Id.* at ¶ 30.) But the Turnauckases “are not investors of the

1 loan trust” and therefore they “lack standing to challenge the validity of the securitization of  
 2 the loan.” *Sabherwal v. Bank of New York Mellon*, 2013 WL 101407, at \*7 (S.D. Cal. Jan.  
 3 8, 2013) (internal quotation marks omitted); *In re Davies*, 565 F. App’x 630, 633 (9th Cir.  
 4 2014) (collecting cases and explaining that debtors who are not parties to the pooling and  
 5 servicing agreements cannot challenge them). The Turnauckases’ claims that are premised  
 6 on their botched securitization theory fail to state a claim.

## 7 **2. MERS’ Role Doesn’t Diminish Defendants’ Ability to Foreclose**

8 The Turnauckases’ claims also challenge MERS’ role in the assignment of the note  
 9 and DOT, and contend that MERS’ role separated the note and DOT, thereby rendering the  
 10 DOT unenforceable. (Docket no. 1-2 at ¶¶ 37, 75.) But they agreed to MERS’ role when  
 11 they executed the DOT. (Docket no. 7-2 at 2–4.) Thus, MERS was authorized to make the  
 12 assignment. See *Boyster v. Wells Fargo Bank, NA*, 2012 WL 1144281, at \*5 (N.D.Cal. Apr.4,  
 13 2012). The Turnauckases “also cannot bring a claim based on the contention that the  
 14 assignment impermissibly separates the note and the deed of trust, rendering the deed of  
 15 trust unenforceable.” *Shull v. Ocwen Loan Servicing, LLC*, 2014 WL 1404877, at \*4 (S.D.  
 16 Cal. Apr. 10, 2014); see also *Sargent v. JPMorgan Chase Bank, N.A.*, 2013 WL 3878167,  
 17 at \*2 (N.D. Cal. July 25, 2013) (rejecting claim where plaintiff did not make clear how note  
 18 and deed of trust were irreparably split, or why MERS was not acting as agent of the lender).  
 19 Thus, the Turnauckases’ claims that are premised on their challenge to MERS’ role or an  
 20 alleged split of the note and DOT fail to state a claim.

## 21 **3. The Fraud Allegations Aren’t Pleaded With Particularity**

22 The Turnauckases allege that the substitution and assignment were fraudulently  
 23 executed and “created for the purpose of facilitating and aiding and abetting the illegal,  
 24 deceptive, and unlawful collection of Plaintiffs’ mortgage payments, as well as engaging in  
 25 other debt collection activities.” (Docket no. 1-2 at ¶¶ 53, 61.) They allege that the “signor”  
 26 of the substitution of trustee and assignment “was not an ‘Assistant Secretary’ for MERS and  
 27 in fact, the Substitution was fraudulently signed without the actual lenders, knowledge or  
 28 authorization.” (*Id.* at ¶¶ 38, 39, 48–52.) As a result, they contend, the defendants are

1 “fraudulently enforcing a debt obligation in which they have no pecuniary equitable or legal  
 2 interest.” (*Id.* at ¶ 72.) The Turnauckases’ “allegations of fraudulent assignment lack  
 3 sufficient facts to support a cognizable legal theory that the assignment was fraudulently  
 4 executed.” *Sabherwal v. Bank of New York Mellon*, 2013 WL 101407, at \*8 (S.D. Cal. Jan.  
 5 8, 2013). They’re conclusory and they lack supporting factual allegations necessary to  
 6 satisfy the pleading standard for alleging fraud.

7 Because the Turnauckases’ claims are premised on untenable legal theories and  
 8 conclusory allegations of fraud, they’re dismissed.

### 9 **III. Notice of *Lis Pendens***

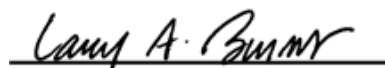
10 The Turnauckases have filed a notice of *lis pendens*. (Docket no. 8.) Caliber has  
 11 moved to expunge it. (Docket no. 11.) A party opposing a motion to expunge a *lis pendens*  
 12 must “make a showing that he is likely to prevail on the merits.” *Doan v. Singh*, 2014 WL  
 13 3867418, at \*3 (E.D. Cal. Aug. 6, 2014) (internal quotation marks omitted). The  
 14 Turnauckases can’t make the required showing, so the *lis pendens* is expunged.

### 15 **IV. Conclusion**

16 The motions to dismiss (Docket nos. 6 and 9) are **GRANTED WITHOUT**  
 17 **PREJUDICE**. If the Turnauckases think they can successfully amend their complaint, they  
 18 must seek leave by *ex parte* motion no later than January 11, 2016. Their proposed  
 19 amended complaint must be attached as an exhibit to the motion. If they file such a motion,  
 20 defendants shall have until January 25, 2016 to oppose it. No reply should be filed unless  
 21 leave is obtained in advance. Caliber’s motion to expunge the *lis pendens* (Docket no. 11)  
 22 is **GRANTED**.

23 **IT IS SO ORDERED.**

24 DATED: December 18, 2015

25 

26 **HONORABLE LARRY ALAN BURNS**  
 27 United States District Judge  
 28